A

BISI JINGGOT

v.

SUPERINTENDENT OF LANDS AND SURVEYS KUCHING DIVISION & ORS

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
C SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 01(f)-11-05-2012(Q)]
11 JULY 2013

D ***LAND LAW:*** *Customary land - Native Customary Rights (NCRs) - Claim for - Whether appellant acquired NCRs over parcels of land through sale and purchase agreements - Creation of native customary land - Whether conditional upon adherence to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and* E *occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or acquire through "tungkus asi" procedure - Appellant not native of community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code* F *1958, s. 5(2)(f)*

NATIVE LAW AND CUSTOM: *Declaratory order - Application for - Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land through sale and purchase agreements - Creation of native customary land - Whether conditional upon adherence* G *to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or acquire through "tungkus asi" procedure - Appellant not native of* H *community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code 1958, s. 5(2)(f)*

NATIVE LAW AND CUSTOM: *Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land* I *through sale and purchase agreements - Creation of native customary land - Whether conditional upon adherence to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and*

occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or acquire through "tungkus asi" procedure - Appellant not native of community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code 1958, s. 5(2)(f)

The appellant, an Iban/Sea Dayak by race and a native of Sarawak, filed a writ of summons at the High Court seeking declarations against the defendants involving three parcels of land. He pleaded that he had acquired native customary rights ("NCR") over the said three parcels of land through eight sale and purchase agreements ("S&Ps") and through a mixture of customary and other legal means. The appellant also pleaded that by his continuous occupation and cultivation of the two parcels, together with the rights given to extract timber from the third parcel, he had acquired NCR over them. The declarations sought for by the appellant were, *inter alia*, that with the acquisition of the NCR, all the respondents were precluded from impairing the appellant's rights over the three parcels of land and that there was an alleged infringement of his rights over all the three parcels of land. The High Court dismissed the appellant's prayers for declaratory and consequential orders. The Judicial Commissioner ("JC") found that the appellant's alleged acquisition of the NCR was pursuant to ordinary sale and purchase transactions. The JC further opined that NCR could not be transferred to another person by such means. The Court of Appeal, in dismissing the appellant's appeal, further held the view that it was legally bound to take judicial notice of the customary law established by the Native Court of Appeal in Sarawak particularly the NCR principle having been created or acquired by natives through the practice of their customs, with such rights not transferable for value to someone else outside the community or district. The Federal Court granted the appellant leave to appeal on these questions: (i) whether the alleged *adat* or custom that "individual customary rights are not transferable by sale or otherwise for value" referred to and applied in *Sumbang Ak Sekam v. Engkarang Ak Ajah* ceased to exist and enforceable as such: (a) upon enactment of the same as law under s. 2 of the Fruit Trees Order 1889 of the Rajah Order; and/or (b) upon the subsequent repeal of the said Rajah's Order; and (ii) whether by virtue of s. 6 of the Sarawak Land Code, the alleged adat or custom applied only to land gazetted as native communal reserve.

Held (dismissing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Being an Iban, the provision of s. 2 of the Fruits Trees Order 1889 applied to the appellant. The Fruit Trees Order 1889 merely confirms the existence of a dual system of land *ie*, one subject to grant and the other not. Interpretatively, under the system where a Dayak has a grant, he could claim, sell or transfer any farming ground in such river or district, to others. Under the other sisterly system, where the Dayak has no grant *ie*, untitled land and invariably applicable to customary land, he may not claim, sell or transfer any farming ground in such river or district. Whether s. 2 of the Fruit Trees Order 1889 was enacted or repealed subsequently made no difference to Native Customary Land or of the law and rights attached to it as its subsistence was guaranteed. The subsequent enactment of the Sarawak Land Code 1958 (Cap 81), the primary statute to make better provision in the law relating to land and at the same time ensuring the continued existence of Native Customary Land, left the NCR unscathed. (paras 29, 30 & 31)

(2) The creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two modes. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned, whatever NCR was created or acquired previously over that land would be lost. If the original owner abandoned the land without more, the community takes over. (paras 37 & 38)

(2a) Even though native customary land remains State land, with such rights acquired being considered as individual rights, after his death that land may be inherited. The appellant certainly could not inherit those eight lots as he was not an heir to the vendors. An original owner of native customary land who had no heir, may circumvent the loss of such NCR over the land by passing that land to some other person

within the community, subject to him handing over the original owner what was traditionally called *tungkus asi*. The *tungkus asi* is a form of token (*tanda*) symbolising the transfer of rights of the cleared land to the new owner. This token is customarily of little value, perhaps fetching the value of a pig, usually handed over in front of the head of the community. The appellant, though an Iban, would fail to qualify as a legitimate recipient of the *temuda* from the vendors as he was not a native of that community. (para 38)

(3) The novel argument that the S&P's would fall under the phrase of "any other lawful method" which was only concerned with newly created NCR as provided for under s. 5(2)(f) of Sarawak Land Code 1958 (Cap 81), must equally fail by virtue of those eight lots being native customary land created prior to 1 January 1958. Further, there was no hint of any provision in Cap 81 that legitimised any transfer of pre 1 January 1958 acquired NCR through the mode of S&Ps. Such a drastic change that drifts away from established natives customary law require express and clear language in Cap 81 (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh*, refd). (para 39)

(4) With the ineligibility of the appellant to inherit or acquire through the *tungkus asi* procedure, and the litany of case laws (*Sat ak Akum & Anor v. Randong ak Charareng*, refd; *Sumbang Ak Sekam v. Engkarang Ak Ajah*, refd), it was established that individual customary rights were not transferable by sale or otherwise for value, thus invalidating the S&Ps. The position of the appellant was therefore tenuous. With the S&Ps being in contravention of customary land law in force immediately prior to 1 January 1958, the answer to questions 1(a) and (b) therefore must be in the negative. (para 40)

(5) The appellant in his pleadings stated that the eight lots were located in the native area land whilst this question pertained to native communal reserve, an area which had no bearing over the disputed properties. Thus, there was no necessity to answer question (ii). Further, the appellant's case rested on conditional sale and purchase agreements, and the express conditions were never fulfilled thus rendering the S&Ps void and ineffective. (para 42)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu, seorang yang berbangsa Iban/Dayak Laut dan berasal dari Sarawak, memfailkan writ saman di Mahkamah Tinggi menuntut pengisytiharan-pengisytiharan terhadap defendan-defendan yang
B melibatkan tiga bidang tanah. Perayu memplidkan bahawa dia telah memperolehi hak tanah adat ("HTA") ke atas tiga bidang tanah tersebut melalui lapan perjanjian jual beli ("PJB") dan melalui gabungan adat dan langkah perundangan lain. Perayu juga memplidkan bahawa memandangkan dia telah berpendudukan kekal
C dan membuat penanaman di kedua-dua bidang tanah itu, bersama-sama dengan hak-hak yang diberi kepadanya untuk mengeluarkan kayu balak daripada bidang tanah ketiga, dengan itu dia telah memperolehi HTA ke atasnya. Pengisytiharan-pengisytiharan yang dituntut oleh perayu adalah, antara lain, dengan pengambilalihan
D HTA, responden-responden terhalang daripada merosakkan hak-hak perayu ke atas ketiga-tiga bidang tanah tersebut dan bahawa terdapat pelanggaran hak asasinya ke atas ketiga-tiga bidang tanah tersebut. Mahkamah Tinggi menolak tuntutan-tuntutan perayu untuk pengisytiharan dan perintah-perintah berbangkit. Pesuruhjaya
E Kehakiman ("PK") mendapati bahawa dakwaan perayu berkenaan pengambilalihan HTA adalah melalui transaksi jual beli biasa. PK juga berpendapat bahawa HTA tidak boleh dipindah milik kepada pihak lain melalui cara tersebut. Mahkamah Rayuan, dalam menolak rayuan perayu, selanjutnya memutuskan bahawa ia terikat
F secara undang-undang untuk menggunapakai pengiktirafan kehakiman undang-undang adat yang ditubuhkan oleh Mahkamah Rayuan Anak Negeri terutamanya prinsip HTA yang telah diwujudkan atau diperolehi oleh orang-orang asli melalui amalan adat resam mereka, dengan hak-hak sebegitu tidak boleh
G dipindahmilik untuk nilai kepada orang lain di luar komuniti atau daerah. Mahkamah Persekutuan memberi kebenaran kepada perayu untuk merayu atas persoalan-persoalan ini (i) sama ada adat atau kastam bahawa "hak-hak adat secara individu boleh dipindahmilik melalui jualan atau sebaliknya untuk nilai" yang dirujuk dan
H digunapakai dalam *Sumbang Ak Sekam v. Engkarang Ak Ajah* telah berakhir dan berkuatkuasa seperti: (a) atas enakmen yang sama seperti undang-undang di bawah s. 2 Fruit Trees Order 1889 Perintah Rajah; dan/atau (b) atas pemansuhan berikutnya Perintah Rajah tersebut; dan (ii) sama ada menurut s. 6 Kanun Tanah
I Sarawak, adat hanya terpakai ke atas tanah yang diwartakan sebagai rizab kaum asli.

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Sebagai seorang Iban, peruntukan s. 2 Fruits Trees Order 1889 terpakai ke atas perayu. Fruits Trees Order 1889 hanya mengesahkan kewujudan sistem dwi tanah iaitu satu tertakluk kepada geran dan satu lagi tidak. Secara interpretasi, di bawah sistem di mana seorang Dayak mempunyai geran, ia membolehkannya menuntut, menjual atau memindah milik mana-mana tanah pertanian di sungai atau daerah, kepada pihak lain. Di bawah sistem yang satu lagi, di mana seorang Dayak tidak mempunyai geran iaitu tanah tak bermilik dan biasanya terpakai kepada tanah adat, dia tidak boleh menuntut, menjual atau memindah milik mana-mana tanah pertanian di sungai atau daerah. Sama ada s. 2 Fruit Trees Order 1889 telah digubal atau dimansuhkan seterusnya tidak mendatangkan perbezaan ke atas Tanah Adat atau undang-undang dan hak-hak yang dilampirkan kepadanya kerana penguatkuasaannya dijamin. Enakmen yang kemudiannya iaitu Kanun Tanah Sarawak 1958 (Cap 81), statut asas yang membuatkan peruntukan yang lebih baik dalam undang-undang berhubung tanah dan pada masa yang sama memastikan kewujudan berterusan Tanah Adat, tidak menjejaskan HTA.

(2) Pembentukan tanah adat dan hak-hak yang diperolehi oleh seorang yang berasal dari Sarawak, adalah tertakluk kepada pematuhan adat atau amalan biasa masyarakatnya. Bagi seorang Iban, ia mempunyai konsep adat *Tusun Tunggu* di mana HTA boleh diperolehi melalui dua cara. Melalui cara pertama, aliran yang dipersetujui adalah pengambilalihan HTA bermula dengan pembersihan tanah dara yang tidak dimiliki atau hutan oleh seorang anak negeri, diikuti dengan pendudukan tanah yang telah dibersihkan dan seterusnya tidak meninggalkan tanah tersebut. Sekali ditinggalkan, apa-apa HTA yang telah dibentuk atau diperolehi sebelum ini ke atas tanah tersebut akan hilang. Jika pemilik asal telah meninggalkan tanah tersebut, masyarakat akan mengambil alih.

(2a) Walaupun tanah adat kekal sebagai Tanah Negeri, dengan hak-hak yang telah diperolehi dianggap sebagai hak individu, selepas kematian seorang individu itu, tanah tersebut boleh

diwarisi. Perayu tidak boleh mewarisi lapan lot tersebut kerana dia bukan waris kepada penjual-penjual. Pemilik asal tanah adat yang tidak mempunyai waris, boleh mengelakkan kehilangan HTA ke atas tanah tersebut dengan memberikannya kepada orang lain dalam masyarakat yang sama, tertakluk kepada pemberian apa yang dipanggil secara tradisional *tungkus asi* kepada pemilik asal. *Tungkus asi* adalah satu bentuk tanda yang melambangkan pindah milik hak-hak tanah yang telah dibersihkan kepada pemilik baru. Tanda ini tidak mempunyai nilai yang tinggi, ia mungkin boleh disamakan dengan nilai seekor babi, yang biasanya diserahkan di hadapan ketua masyarakat. Perayu, walaupun seorang Iban, gagal melayakkan dirinya sebagai penerima yang sah *temuda* daripada penjual-penjual kerana dia bukan seorang anak negeri yang berasal daripada masyarakat itu.

(3) Hujahan bahawa PJB boleh terjumlah di bawah frasa "any other lawful method" yang hanya berkaitan dengan HTA yang baru dicipta seperti yang diperuntukkan di bawah s. 5(2)(f) Kanun Tanah Sarawak 1958 (Cap 81), sewajarnya gagal kerana lapan lot tersebut adalah tanah adat yang dicipta sebelum 1 Januari 1958. Selanjutnya, tidak terdapat peruntukan dalam Cap 81 yang mengesahkan apa-apa pindahmilik HTA yang diperolehi sebelum 1 Januari 1958 melalui PJB. Perubahan mendadak sebegitu yang terpesong daripada undang-undang adat yang telah ditubuhkan memerlukan bahasa yang jelas dan terang dalam Cap 81 (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh*, dirujuk)

(4) Dengan ketidaklayakan perayu untuk mewarisi atau memperolehi melalui prosedur *tungkus asi*, dan beberapa kes undang-undang (*Sat Ak Akum & Anor v. Randong Ak Charareng*, dirujuk; *Sumbang Ak Sekam v. Engkarang Ak Ajah*, dirujuk) yang membuktikan bahawa hak-hak adat tidak boleh dipindahmilik melalui jualan atau sebaliknya untuk nilai, oleh itu telah membatalkan PJB. Dengan itu, kedudukan perayu adalah lemah. Dengan PJB yang telah melanggar undang-undang adat yang berkuatkuasa sebelum 1 Januari 1958, jawapan kepada persoalan 1(a) dan (b) adalah negatif.

(5) Perayu dalam plidingnya menyatakan bahawa lapan lot tersebut terletak di kawasan tanah asli manakala soalan ini berhubungan dengan rizab kaum asli, sebuah kawasan yang tiada perkaitan dengan tanah-tanah yang dipertikaikan. Oleh itu, tiada keperluan untuk menjawab persoalan (ii). Tambahan lagi, kes perayu terletak pada perjanjian jual beli bersyarat, dan syarat-syarat yang dinyatakan tidak dipenuhi, dengan itu menjadikan PJB tidak sah dan tidak berkesan.

Case(s) referred to:

Abang v. Saripah [1969] 1 LNS 2 CA ***(refd)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Sapiah Mahmud v. Superintendent of Lands and Surveys Samarahan Division & Ors [2009] 9 CLJ 567 HC ***(refd)***

Sat Ak Akum & Anor v. Randong Ak Charareng [1958] SCR 104 ***(refd)***

Sumbang Ak Sekam v. Engkarang Ak Ajah [1958] SCR 95 ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 161A(7)

Fruit Trees Order 1889, s. 2

Sarawak Land Code 1958, ss. 2, 4(1), (4), 5(1), (2)(ii), (f), (3), 6, 10(4)

Other source(s) referred to:

Lee Hun Hoe, *Cases on native Customary Law in Sarawak*, p 144

For the appellant - Mekanda Singh Sandhu (Kalveet Singh Sandhu with him); M/s Sandhu & Co

For the 1st & 2nd respondents - JC Fong (Saferi Ali & Mohd Adzrul Adzlan with him); State AG's Chambers

For the 3rd respondent - Abang Halit Abang Malik; M/s Loke, King, Goh & Partners

For the 4th respondent - Bexter Michael; M/s Ee & Lim Advocates

[Editor's note: For the Court of Appeal judgment, please see Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors [2012] 1 LNS 260.]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] On 9 April 2012 the Federal Court granted the plaintiff, hereinafter referred to as the appellant, leave to appeal on three questions. On the day of the appeal the appellant invited us to determine only two questions, and they are:

(i) Whether, the alleged adat or custom that "individual customary rights are not transferable by sale or otherwise for value" referred to and applied in *Sumbang Ak Sekam v. Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon enactment of the same as law under Section 2 of the Fruit Trees Order 1889, of the Rajah; and/or

(b) upon the subsequent repeal of the said Rajah's Order?

(ii) If the answers to question (1) above are in the negative, whether, by virtue of section 6 of the Land Code, the alleged adat or custom applies only to land gazetted as native communal reserve?

Antecedent And Facts Of Appeal

[2] The appellant being an Iban and/or sea Dayak by race, thus a native of Sarawak, filed a writ of summons at the High Court of Sabah and Sarawak seeking declarations against the four respondents (defendants) involving three parcels of land. He pleaded that he had acquired native customary rights (NCR) over the said three parcels of land through eight sale and purchase agreements (S&Ps) and through a mixture of customary and other legal means. The following are the details of the transactions regarding these parcels of land and court action.

[3] The first parcel of land comprise eight lots bought under eight different S&Ps from five different NCR beneficial owners who had acquired the NCR by means of Iban's customary land law prior to 1 January 1958. Five lots (lots 7, 9, 35, 36 and 43) were bought on 8 December 1984, two lots (lots 3 and 29) were bought on 29 October 1990 and one lot (lot 2) was bought on 10 July 1991. The appellant pleaded that he had continuously occupied and cultivated those eight lots of land. As per the pleadings the appellant stated that the eight lots had been gazetted as native area land.

[4] The second parcel is lot 34 measuring 2.94 acres and likewise had been cultivated by him as early as 1986. He said he was the first person to cultivate this lot in 1986 under the Cocoa Scheme and later under the SEDC adoption scheme for cattle farming in 1991.

[5] The third parcel measuring 34 acres comprised three lots (lots 1, 2 and 3) of land. This parcel was given to him through his wholly owned company by the Forest Department of Sarawak on 7 of September 1993 *vide* a Letter of Authority No. 6/93. He was permitted to extract logs or timber from this parcel.

[6] The appellant also pleaded that he was given the understanding and or guarantee by the first respondent that if ever titles were issued for all the three parcels he would be the recipient of the issued titles. He also pleaded that by his continuous occupation and cultivation of the two parcels, together with the rights given to extract timber from the third parcel, he had acquired NCR over them.

The Prayers In The Statement Of Claim

[7] We now touch on the prayers pleaded in the statement of claim. His first prayer was for a declaration that he acquired NCR over the said three parcels of land either collectively or separately. Collectively all the 12 lots would fall under this first prayer. The second declaration prayed for was that with the acquisition of the NCR all the respondents were precluded from impairing his rights over the three parcels of land. The third declaration was for an alleged infringement of his rights over all the three parcels of land. He pleaded that on or about April 1993 two issue documents of title were issued for two areas known as Lots 85 and 86 in favour of the fourth respondent by the first and second respondents. The areas of Lots 85 and 86 covered or included portions of all three parcels claimed by the appellant inclusive of the eight lots obtained *vide* the eight S&Ps. He claimed that his NCR over the lands had been impaired and their inclusion in the two issue documents was null and void, irregular and unlawful as no prior extinguishment of his NCR had ever taken place. As against the third respondent the appellant claimed that the Chief Scout Commissioner of Sarawak trespassed over those plots of land causing damage and hence entitled to damages. The rest of the prayers were consequential prayers.

A **Defence Of The Respondents**

[8] The respondents in their respective defences took the collective stance that the appellant had not acquired NCR over the first parcel of land through the S&Ps. With no NCR created or acquired prior to 1 January 1958 over the impugned lands no NCR could have been transferred to the appellant.

[9] As regards the second parcel the respondents replied that any activity carried out over that land was done without any lawful authority. Pertaining to the third parcel, the respondents agreed that a letter of authority (6/93) was indeed issued on 7 September 1993 permitting the appellant to extract forest produce on that parcel of land but by 6 February 1994 the document had expired, causing further extraction of forest produce illegal.

[10] Further the respondents denied the existence of any understanding that the appellant would be issued with titles over the three parcels of land in the event titles were issued. Additionally, the fourth respondent fielded the defence that by the issuance of the documents of title it had acquired an indefeasible title over Lots 85 and 86, which included the eight lots located in the first parcel.

[11] Alternatively the learned State Legal Counsel for the first and second respondents also submitted that the appellant's case rested on conditional sale and purchase agreements (see para 8 statement of claim) as a basis for his alleged acquisition of NCR over the parcels of land; the condition precedent being that the Sarawak Government would first alienate the lands to the vendors. And since this express condition was never fulfilled the S&Ps were thus rendered void and ineffective.

The High Court's Decision

[12] On 30 April 2008, the High Court dismissed the appellant's prayers for the declaratory and consequential orders. Dr Hamid Sultan, JC found that the appellant was not alleging that the acquisition of the NCR, whether by himself or his father was by the clearance, cultivation, occupation of the land or inheritance undertaken by them, but pursuant to ordinary sale and purchase transactions.

[13] The learned JC opined that NCR could not be transferred to another person by such means. In the course of dismissing the action the learned JC said:

> A native customary right can only be transferred in a limited sense like by gift or inheritance, within the community members of the native. That means, a native at south Sarawak cannot purchase the native customary rights from a native at north Sarawak. The nexus must be within the community and not within the race. For courts to recognize any such transfer it must be legislated.
>
> (i) The appellant did not also acquire native customary rights under the Sarawak Land Code.

The Court Of Appeal's Decision

[14] Being dissatisfied the applicant appealed to the Court of Appeal. This court affirmed the Iban's customary concept of Tusun Tunggu, that an NCR could only be acquired by two modes namely by felling a virgin jungle and planting crops to create temuda, and secondly by gift or inheritance. The Court of Appeal further held the view that it was legally bound to take judicial notice of the customary law established by the native Court of Appeal in Sarawak particularly the NCR principle having been created or acquired by natives through the practice of their customs, with such rights not transferable for value to someone else outside the community or district. On 10 December 2010, the Court of Appeal unanimously dismissed the appeal.

[15] The appellant then successfully obtained leave to appeal to the Federal Court hence the matter before us.

Concessions Made By The Parties

[16] In the course of the proceedings before us the appellant and the respondents made a few concessions. The appellant conceded that he was restricting his appeal to the eight lots comprising the 37.24 acres bought through the S&Ps, as reflected in para 1.3 of the appellant's written submission and confirmed later in open court. By this concession the appellant had abandoned his claim to the other four lots, respectively lot 34 in the second parcel and lots 1, 2, and 3 in the third parcel allegedly covered by the letter of authority. His appeal thus was limited to the alleged NCR obtained through the eight S&Ps.

[17] Learned counsel for the respondents in the course of his submission conceded that the eight lots transacted in the eight S&Ps were indeed native customary land at the time of their execution. By such concession the eight lots will be subject to native customary law, and the need to discuss lengthily whether they are located in a native area land as pleaded, or the creation of the NCR was properly undertaken, become unnecessary. With the lots having been acquired by the vendors prior to 1 January 1958, as pleaded in the statement of claim, the rights acquired will be subject to customary law in force prior to that date. Lee Hun Hoe J in *Rampai ak Chunggat v. Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu* (in *Cases on Native Customary Law in Sarawak* p. 144) had distinctly said:

> But rights acquired prior to 1958 will be decided according to law in force prior to 1958 ...

[18] Notwithstanding the concession, the respondents stood their ground that as the transactions had not adhered to native customary law, and with indefeasible title having been acquired by the fourth respondent, the appellant's position had become untenable.

Our Analysis

[19] Despite the contentious facts having been drastically reduced and the issues simplified, contributed in no small way by the concessions, the need to discuss the current position as regards customary land and the acquired NCR in Sarawak must still be undertaken.

[20] We will begin with the unchallenged evidence adduced by the appellant through a witness in court. At pp. 186-187 RR part B vol. 1, Nicholas Bawin ak Anggat, an Iban and the former Deputy President of the Majlis Adat Istiadat Sarawak, amongst others said:

> As a general rule, the household within the community that first felled the forest secured rights over specific pieces of land. These rights are heritable, passing ideally from generation to generation of households members ...
>
> Rights to a piece of land is lost if it is transferred to another person, for example a sibling, a cousin or a relative. It can also be lost if the person moves to another villages through marriages or migration (pindah).

> The adat on pindah is quite clear on depriving one's rights to customary land. For instance, section 73 of the Adat Iban 1993 stipulates that whoever moves from one longhouse to another shall be deprived of all rights to untitled land or any customary land that has not been planted with crops and all such lands shall be owned in common by the people of the longhouse.
>
> There is no adat on sale of customary land. If a person pindah from the longhouse, rights to customary land will either go to the community or he can transfer such rights to a cousin or relative who will in turn provide him with tungkus asi.
>
> Tungkus asi refers to the token provided by the recipient to the person who on account of his moving from the longhouse to another transfers rights of his customary land to the recipient.

[21] There is marked similarity in the above explanation regarding customary land law as discussed in case laws with the law in force prior to 1 January 1958. To illustrate, in *Abang v. Saripah* [1969] 1 LNS 2; [1970] 1 MLJ 164 the Native Court of Appeal of Sarawak when considering the factual question in issue of whether the appellant or the respondent was entitled to a piece of temuda land, at the same time had discussed Sarawak's native customary law in some detail. Briefly and simply put, temuda land is untitled virgin land cleared by a native whereupon he acquires some restricted right of proprietorship over that cleared land to be used by him. Once it is cleared it becomes temuda. In this case of *Abang v. Saripah* the land was originally cleared by the respondent but subsequently abandoned for more than 20 years. The appellant wanting to claim the contested land alleged that he bought that temuda land from the respondent's brother-in-law. BTH Lee J who sat with two other assessors in the Native Court of Appeal agreed with the decision of the Resident's Native Court and dismissed the appeal. This Native Court of Appeal held that not only did the respondent lose her rights to the land when moving away (pindah) to another district (let alone without any right or power to alienate it), but the appellant likewise on the facts of the case could not claim NCR over it. In the course of it, the learned judge at p. 165 stated the following:

> I do not find it necessary to discuss the point at great length. The law is to be found in the following passage from Native Customary Laws Ordinance (Cap. 51) Vol. VII Sarawak Law Appendix 'A' para 7 at page 636.
>
> > Theoretically all untitled land whether jungle or cleared for padi farming (temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the

> site of their padi farm confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognized custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance ... No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.
>
> There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land 'temuda' and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the rights.
>
> This was made clear by the Rajah's order dated 10th August 1899 Land Tenure Act ...

[22] Another succinct elucidation was given by the Native Court of Appeal, the highest court in the Native Court system in Sarawak, in *Sat Ak Akum & Anor v. Randong ak Charareng* [1958] SCR 104 when it said in the following manner:

> Temuda rights are created by felling the old jungle and cultivating the land, and are created only for the use of original worker, his heirs and descendants. They certainly cannot be transferred for value.
>
> ... The owner leaving the district without any heir may arrange for someone else to have prior right to farm that land by taking from him what is called tungkus asi, which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the tungkus asi are inheritable by the heirs of the person but revert to the original owner if he returns or to his heirs if they return.

[23] Another case for illustration, and incidentally part of the question for our determination, is *Sumbang Ak Sekam v. Engkarang Ak Ajah* [1958] SCR 95. This case not only discussed the customary law of a native in order to obtain NCR, but also

deliberated on the issue of whether such right could be transferred for value. The matter was heard by the Native Court of Appeal of Sarawak, *via* case stated by the presiding Magistrate who had earlier heard the appeal from the Resident's Native Court. The facts of the case are as follows. Guyu, a Dayak who stayed in a longhouse cleared, cultivated and occupied a piece of land but later decided to move to Bintulu. Before leaving he handed over his land and rights to Perada, who in return gave Guyu what is called tungkus asi. Despite having obtained this right Perada failed to use the land. Later this land, which was still without a title, became part of the mixed zone. The appellant ie, *Sumbang Ak Sekam* then desired not only to be declared the holder of the customary rights over the land but also the one to be given the right to a mixed zone title.

[24] When the matter went before the Resident's Native Court, it found that Guyu had contractually sold the land to Perada, and proceeded to hold that the tungkus asi was actually a sale price for the land. In a nutshell it was a commercial deal and that Perada had bought the land from Guyu. The Native Court of Appeal of Sarawak presided by Lascelles J thought otherwise. Before arriving at a factual finding Lascelles J had to contend with three points of native law or custom for decision, one of which is on point with this current appeal ie, whether individual rights are transferable by sale or otherwise for value. The learned judge in the course of disagreeing with the Resident Native Court, after going through the facts, held the view that the heirs of Perada still held full customary farming rights and entitled to apply for title over the land.

[25] Lascelles J explained that tungkus asi could be best interpreted as a customary tanda or token and not a purchase price. He further explained that:

> In former days this was something of little value, supposed to represent a meal which might reach the level of a pig and was usually handed over in front of Tuai Rumah.

[26] The learned judge declared that as the tungkus asi received from Perada by Guyu was a mere token, it could not be regarded as a sale of the property. At p. 96 of the case, he made the statement under scrutiny before us, when he said:

> In the Court's opinion ... Individual customary rights are not transferable by sale or otherwise for value.

[27] The above statement posed for our determination, of whether individual customary rights are not transferable by sale or otherwise for value ceased to exist and become unenforceable upon the enactment and subsequent repeal of the Fruit Trees Order 1889 of the Rajah Order, requires discussion of like orders. The Rajah's Orders, precursors to written and structured forms of Sarawak land law which included the recognition of Sarawak's land customary law, culminating in the Sarawak Land Code 1958 (Cap 81) made matters clearer. Skinner J (as he then was) in *Madeli Salleh v. Superintendant of Lands & Surveys & Anor* [2005] 3 CLJ 697 had occasion to discuss the Rajah's Order 1X 1875 which directed that any person who made clearings of old jungle but subsequently allowing the same to go uncared would lose all claim or title over such land. Such reference in Order 1X 1875 according to the Court of Appeal, of losing all claims over the uncared land, was clear recognition of such native custom of acquisition of NCR over land. This decision was approved by the Federal Court later (see *Superintendant of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509). We see no reason to disagree with the view held by the Court of Appeal of the clear recognition of acquisition of NCR, also confirmed by the Fruit Trees Order 1889 particularly s. 2. This provision reads:

> Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon, unless he holds such land under a grant ...

[28] Before proceeding further some clarification is required on the applicability of this provision on the appellant who is an Iban. The above section speaks of Dayaks. Under art. 161A (7) of the Federal Constitution the definition of natives include Sea Dayaks and Land Dayaks. Under the Sarawak Interpretation Ordinance 2005 found in the schedule again the Dayaks are split into two, namely the Land Dayaks (Bidayuh) and the Sea Dayaks or Ibans. The Sea Dayaks and Ibans are one and the same indigenous race who are natives of Sarawak. As the Order of 1889 speaks of any Dayak regardless of whether a Land Dayak or Sea Dayak, being an Iban the above provision of s. 2 would therefore apply on the appellant.

[29] This Fruit Trees Order 1889, which did not legislate in any way that it was replacing the native customary law, merely confirmed the existence of a dual system of land ie, one subject to grant and the other not. Interpretatively under the system

where a Dayak has a grant he could claim, sell or transfer any farming ground in such river or district, to others. Under the other sisterly system, where the Dayak has no grant ie, untitled land and invariably applicable to customary land, he may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon. Section 2 says nothing about preventing a Dayak having acquired NCR, handing down that right to another native, subject to the adherence of all the tenets of customary land law.

[30] In short whether s. 2 of the Fruit Trees Order 1889 was enacted or repealed subsequently made no difference to native customary land or of the law and rights attached to it as its subsistence is guaranteed. Haidar J in *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169; [1990] 3 MLJ 427 at 432 succinctly said:

> As such it would appear that native customary rights whether communal or otherwise are recognized by the law i.e. the Land Code of Sarawak (Cap 81) (see ss. 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights shall subsist.

[31] The subsequent enactment of the Sarawak Land Code 1958 (Cap 81), the primary statute to make better provision in the law relating to land and at the same time ensuring the continued existence of native customary land, brought major changes but leaving the NCR unscathed. As an example, under Part II of Cap 81 the Minister may by order signified in the Gazette declare any area of land to be native area land or interior land. The Minister is also empowered to declare any area of land to be Mixed Zone and any native area land or interior land located within such area shall be part of the mixed zone s. 4(1). Even the Director of Land and Surveys may, with the approval of the Minister by notification in the gazette, declare any such area as native area land, inclusive of interior area land located in that declared area. Despite these statutory powers to classify land, s. 4(4) of Cap 81 states clearly that no native customary land shall be affected by the above declarations made by the Minister or Director of Lands and Surveys, unless any part thereof may subsequently cease to be native customary land. Section 4(4) reads:

> Where the area in respect of which a declaration has been made under subsection (1), (2) or (3) comprises Native Customary Land, such land shall be unaffected by the declarations ...

[32] Under s. 2 of Cap 81 native customary land includes land on which NCR, whether communal or otherwise, have lawfully been created prior to 1 January 1958. In a gist NCR created prior to 1 January 1958, which does not owe its existence to statutes, is statutorily protected and continues to subsist under s. 4(4) regardless of any declarations (see also *Sapiah Mahmud v. Superintendant of Lands and Surveys Samarahan Division & Ors* [2009] 9 CLJ 567).

[33] Apart from ensuring the subsistence of NCR already in existence prior to 1 January 1958, Cap 81 also provides for the creation of new NCR after 1 January 1958 on interior area land, but subject to a permit (ss. 5(1) and 10(4). Under s. 5(2) the methods by which the new NCR may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for right of way; or

(f) any other lawful method.

[34] The newly created NCR may be subject to extinguishment by direction of the Minister upon adherence of certain statutory requirements s. 5(3). Section 5(2)(ii) of Cap 81 is highly relevant if any extinguishment exercise of the new NCR is undertaken. It reads:

> the question whether any such right has been acquired or has been lost or extinguished shall, save as in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

[35] In simple terms, in the event any acquisition of new NCR comes under scrutiny, or whether subsequently lost, or extinguished shall be determined by the law in force immediately prior to the first day of January, 1958. This provision therefore does not differentiate the treatment of the newly created NCR and rights acquired prior to 1 January 1958 (see *Rampai ak Chunggat v. Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu (supra)*.

[36] Additional to the newly created NCR, is the creation of native communal reserves under s. 6 of Cap 81 whereupon the Minister may order and declare any area of State land for the use of any community having a native system of personal law. Rights in that native communal reserve shall be regulated by the customary law of the community for whose use it was declared to be reserved. Not unlike newly created NCR in interior area land, the Minister may by order signified in the gazette declare any part of the native communal reserve to cease being part of it.

Our Decision

[37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of Tusun Tunggu whereby NCR could be acquired by two modes namely clearing untitled virgin jungle enroute to the creation of what is locally described as temuda and the other by receiving the temuda as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned whatever NCR was created or acquired previously over that land would be lost. If the original owner abandons the land without more the community takes over.

[38] Even though native customary land remains State land, with such rights acquired being considered as individual rights, after his death that land may be inherited. The appellant certainly cannot inherit these eight lots as he is not an heir to the vendors. An original owner of native customary land who has no heir, may circumvent the loss of such NCR over the land by passing that land to some other person within the community, subject to him handing over to the original owner what is traditionally called tungkus asi. The tungkus asi is a form of token (tanda) symbolising the transfer of rights of the cleared land to the new owner. This token is customarily of little value, perhaps fetching the value of a pig, usually handed over in front of the head of the community. The appellant, though an Iban, will fail to qualify as a legitimate recipient of the temuda from the vendors as he not a native of that community.

[39] The novel argument that the S&Ps would fall under the phrase of "any other lawful method", which concerns only newly created NCR as provided for under s. 5(2)(f) of Cap 81, must equally fail by virtue of those eight lots being native customary land created prior to 1 January 1958. Lastly there is no hint of any provision in Cap 81 that legitimises any transfer of pre 1 January 1958 acquired NCR through the mode of S&Ps. Such a drastic change that drifts away from established natives customary law require express and clear language in Cap 81 (*Hj Khalid Abdullah v. Khalid Abg Haji Mazuki & Anor* (Kuching OM KG 3/1983-Land Cases (1969-1987); *Superintendant of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 per Arifin Zakaria FCJ (as he then was)).

[40] With the ineligibility of the appellant to inherit or acquire through the tungkus asi procedure, let alone the litany of case laws, inclusive of *Sat ak Akum & Anor v. Randong ak Charareng (supra)* and *Sumbang Ak Sekam v. Engkarang Ak Ajah (supra)*, establish that individual customary rights are not transferable by sale or otherwise for value thus invalidating the S&Ps, the position of the appellant is tenuous. With the S&Ps being in contravention of customary land law in force immediately prior to 1 January 1958, the answer to questions 1(a) and (b) therefore must be in the negative.

[41] We find it unnecessary to answer question (ii) as the appellant in his pleadings stated that the eight lots are located in the native area land whilst this question pertains to native communal reserve, an area which has no bearing over the disputed properties.

[42] I now return to the alternative argument of the State Legal Counsel briefly touched earlier. He argued that the appellant's case rested on conditional sale and purchase agreements, and the express conditions were never fulfilled thus rendering the S&Ps void and ineffective. We agree with this submission.

[43] We therefore dismiss this appeal with costs. We now invite parties to submit on the amount of costs.